standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence.

This is a question for decision by the Magistrate, and the Judge alone, even though the latter is sitting with Assessors.

In the case of a trial with a Jury, the matter is slightly different and the relevant section is worded differently. Section 214 of the Criminal Procedure Code is worded precisely the same as Section 204 of the Colony Criminal Procedure Code, and subsection (1) provides that the Court "if it considers that there is no evidence that the accused committed the offence shall direct the Jury to return a verdict of not guilty," but the words "no evidence" in this instance do not mean "no sufficient satisfactory, trustworthy or conclusive evidence" and it means what it says, *i.e.* that even if all the evidence given were perfectly true, it does not amount to legal proof that the accused committed the offence charged. It is, however, provided by sub-section (3) that at any time after the conclusion of the evidence for the prosecution the Jury may stop a case and find an accused not guilty if they consider the case to be one in which they could not safely convict. This is a power vested in the Jury which can be acted upon irrespective of the views held by the presiding Judge, and it is usually under this subsection that Counsel for an accused makes such submission. Whether Counsel can address the Jury on the point, does not appear to have been definitely decided but if he does, then no doubt Counsel for the Prosecution would be entitled to reply, apart from the Judge also expressing his views. It is, however, a power specifically conferred upon Juries and in the exercise of which they have an unfettered discretion.

Appeal allowed. New trial ordered.

[ORIGINAL CIVIL JURISDICTION]

GORDON-SMITH, J.

June 23, 1939.

N. M. JOSEPH v. LEN HUP & CO. & ANOR.

[SELANGOR CIVIL SUIT No. 99 of 1938]

Civil Procedure Code, Ss. 408, 409—service on person alleged to be a partner of defendant firm—denial of partnership—conditional appearance—application to set aside plaint and summons—whether application maintainable.

Where a summons and a plaint are served on a person alleged to be a partner and the person having management or control of the firm sued and the person so served denies that he is a partner the proper procedure is laid down in Section 409 of the Civil Procedure Code under which he may file a written statement denying that he is a partner.

Case referred to:—

(1) *Sabatier v. The Trading Co.* (1927) 1 Ch. D. 495.

SUMMONS IN CHAMBERS.

Briggs for Kamaruddin bin Haji Ibrahim (applicant).

Applicant was served as 'partner and manager'. He entered appearance. It was 'conditional appearance'. That is in accordance with well-known English practice. He asks for service to be set aside. He refers to the English Practice.

Ramani (*Sen* with him) for the plaintiff (respondent).

On a preliminary point we submit this application is not maintainable. We have no 'conditional appearance' under our code. Cap. 33 Civil Procedure Code, Ss. 408 & 409. Its provisions are borrowed from Indian Order 30 Rules 7 & 8. Indian Rules have since been amended to provide for 'appearance under protest'. Here we still follow the old rule. Sections 408 & 409 indicate what should have been done. The reason of the rule is obvious. Civil Procedure Code should be construed as a complete Code on the law of procedure.

Briggs in reply refers to heading of Chapter XXXIII of the Code. Existence of partnership is essential. If no firm is in existence Sections 408 & 409 do not come in at all. *Sabatier vs. The Trading Co.*,(1).

Sections 408 & 409 are at best alternative procedure.

Gordon-Smith, J.—The Plaint in this suit is dated the 31st May 1938 and claims heavy damages against the abovenamed Defendants in respect of injuries arising out of a motor car accident. The Summons and Plaint were served on one Kamaruddin bin Haji Ibrahim as the partner of the 1st Defendant and as the person having the control and management of the 1st Defendant firm.

It was so served on the 23rd July 1938.

An appearance was entered for the 2nd Defendant on the 27th July 1938.

The same day, a conditional appearance was entered for the 1st Defendant "without prejudice to an application to set aside service of the summons and

plaint upon the said Kamaruddin bin Haji Ibrahim, who is neither a partner nor the person having control and management of the 1st Defendant and upon the further ground that no such partnership firm exists or ever existed."

On the 10th August 1938, a summons (Enclosure 12) was taken out on behalf of Kamaruddin applying that the service of the plaint and summons on him be set aside on the grounds stated in the notice of conditional appearance.

This summons came on for hearing before me in Court on the 9th June 1939. The suit had been listed for trial, why, I do not know, as the application on this summons should have been heard in Chambers.

At the hearing, a preliminary objection was taken by counsel for the Plaintiff—to the effect that under the existing rules and procedure of the Court there was no provision for and no such thing as entering a conditional appearance. Where however suits were instituted by or against firms and persons carrying on business in names other than their own, the practice and procedure in regard to service was that laid down in Cap. XXXIII, sections 402—413 of the Civil Procedure Code.

It was submitted therefore that, where a person who was served as a partner denied the partnership or that he was a partner, the proper procedure to be adopted was that laid down in sections 408 and 409 and that these sections would be applicable to the circumstances where, under the English Rules, a conditional appearance would have been entered.

Section 408 provides that in the case of service on a person having the control or management of the partnership business, there is no necessity for him to enter an appearance unless he is a partner of the firm sued.

Section 409 provides that any person denying that he is a partner may file a written statement to that effect but the suit continues against the firm provided the requirements of section 404 are complied with. Section 404 provides that where persons are sued as partners in the name of the firm, there must be service on one or more of the partners or service at the principal place of business upon any person having at the time of the service the control or management of the partnership business. The difficulty is that it is alleged that Kamaruddin, who was served, was neither a partner nor the person having such control or management and that no such partnership firm exists or ever existed.

It seems to me therefore that the position so far as Kamaruddin is concerned, is covered by section 409. All he has to do is to file a statement as therein contained and the suit cannot continue until a partner or alternatively the manager has been served in accordance with section 404.

What happens subsequently if the statement is controverted is not before me at the moment and all I am concerned with is the question of whether the proper procedure has or has not been adopted by Kamaruddin in entering a conditional appearance, for which there is no provision in our rules. My answer to that is that it is not in order and that the procedure outlined in section 409 is the correct procedure which should have been adopted by him.

It follows therefore that the Summons in Chambers before me and taken out by him is also out of order and must be dismissed, with costs against Kamaruddin, in any event.

Application dismissed.

[ORIGINAL CIVIL JURISDICTION]
POYSER, C.J.
September 11, 1939.

COLDHAM
v.
THE RAUB AUSTRALIAN GOLD MINING CO., LTD.

[SELANGOR CIVIL SUIT No. 12 of 1938]

Civil Procedure Code (Cap. 7), S. 369,—security for costs—discretionary power of Judges to order.

A plaintiff ordinarily resident outside the jurisdiction of the Court, will generally be ordered to give security for costs. If, however, he resides in a country where provision exists for the reciprocal enforcement of judgments with the country in which the suit is instituted, then security for costs will not be required to be furnished.

Cases referred to:—

(1) *Crozat v. Brogden* (1894) 2 Q.B. 30.

(2) *Ellis v. Stewart* (1887) 35 Ch. D. 459.

(3) *In re Howe Machine & Co.* 41 C.D. 118.

(4) *In re Indian, Kingston & Sandhurst Mining Co.* (1882) 22 Ch. D. 83.

(5) *Lydney & Wigpool Iron Ore Co. v. Bird* (1883) 23 Ch. D. 358.

(6) *Martano v. Mann* (1880) 14 Ch. D. 419.

(7) *In re Percy & Kelly Nickel Cobalt & Chrome Iron Mining Co.* (1876) 2 Ch. D. 531.